

ARKANSAS COURT OF APPEALS  
NOT DESIGNATED FOR PUBLICATION  
JOSEPHINE LINKER HART, JUDGE

DIVISION III

CA07-235

CATHY WRIGHT

APPELLANT

October 3, 2007

V.

APPEAL FROM THE ARKANSAS  
WORKERS' COMPENSATION  
COMMISSION  
[NO. E609015]

McMILLAN, TURNER, McCORKLE &  
CURRY; Employers Mutual Casualty,  
Death & Permanent Disability Trust Fund  
APPELLEES

REVERSED AND REMANDED  
ON DIRECT AND CROSS-APPEALS

The Arkansas Workers' Compensation Commission found that appellant, the employee/claimant, failed to prove by a preponderance of the evidence that she was permanently and totally disabled, but further found that she sustained a twenty-percent wage-loss disability above her ten-percent permanent-impairment rating. She appeals, arguing that she is permanently and totally disabled, or alternatively, that she suffered a wage-loss disability greater than twenty percent. Appellees, the employer and the employer's insurance provider, cross-appeal, arguing that appellant did not suffer any wage-loss disability. We address these appeals together, and we reverse and remand, concluding that substantial evidence does not support the Commission's decision that appellant suffered only a twenty-percent wage-loss

disability.

Our workers' compensation statutes provide that "[i]n considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Workers' Compensation Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity." Ark. Code Ann. § 11-9-522(b)(1) (Repl. 2002). When a claimant has been assigned an anatomical impairment to the body as a whole, the Commission can find a claimant totally and permanently disabled based upon wage-loss factors. *Whitlatch v. Southland Land & Dev.*, 84 Ark. App. 399, 141 S.W.3d 916 (2004). Further, in considering factors that may affect a claimant's future earning capacity, the Commission may consider the claimant's motivation to return to work, because a lack of interest or a negative attitude impedes assessment of the claimant's loss of earning capacity. *Id.*

Our statutes further provide that "[w]hen determining physical or anatomical impairment, neither a physician, any other medical provider, an administrative law judge, the Workers' Compensation Commission, nor the courts may consider complaints of pain." Ark. Code Ann. § 11-9-102 (16)(A)(ii)(a) (Supp. 2007). We note, however, that neither this nor any other provision in the workers' compensation statutes precludes taking into account a claimant's pain when considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment. *See Whitlatch, supra*

(considering pain in a wage-loss disability determination).

In workers' compensation cases, this court reviews "only questions of law and may modify, reverse, remand for rehearing, or set aside the order or award" if the "facts found by the [C]ommission do not support the order or award" or the "order or award was not supported by substantial evidence of record." Ark. Code Ann. § 11-9-711(b)(4)(C), (D) (Supp. 2007).

The administrative law judge (ALJ), in a June 28, 2006 opinion adopted by the Commission, wrote that appellant suffered a compensable injury to her back on May 8, 1996, when, while working as a secretary for her employer, a law firm, she bent over to retrieve a file from a storage box. The ALJ noted that appellant was fifty-three years old at the time of the hearing, had an eleventh-grade education and about twenty college hours in business/secretarial classes, and had worked primarily in secretarial/sedentary work for most of her career. In 1999, appellant was assigned a ten-percent permanent-impairment rating; in 2000, she underwent surgery to her back; and in 2002, she reached maximum medical improvement. The ALJ, however, also noted that appellant testified that she continues to have "sharp and intense pain in her back and left leg and now pain also in her right leg" and continues under pain management treatment. Further, the ALJ stated that appellant takes pain medication every day; that when she takes some of her medicines, she must lie down, as she is not steady on her feet and also has experienced memory loss; that she has about two good days per week; that her pain level on a good day was 7 on a 1-to-10 scale; and that she has

constant pain. The ALJ wrote that appellant testified she did not think she could return to work, as she could not promise a prospective employer that she would be at work every day. The ALJ also observed that appellant returned to work for her employer and worked until September 18, 1996, when she was hospitalized for a reaction to an epidural, and she has not returned to work since. The ALJ further noted appellant's testimony that she has not attempted to work since leaving her employer and that she did not think she could work regularly with her pain and the pain medication she takes.

The ALJ found that appellant was not permanently and totally disabled, but further found that she suffered a twenty-percent wage-loss disability. The ALJ relied upon the testimony of a vocational specialist, who evaluated appellant in 2006. The ALJ noted that, according to the vocational specialist, appellant's "experience and her medical records indicated that [appellant] could return to sedentary work or clerical jobs." The ALJ found that appellant was "credible in her description of her pain and other problems she identified and the effects of the pain medicine." The ALJ, however, "also found the claimant's lack of motivation in pursuing any suitable work substantially impedes her future earnings capacity." After considering appellant's "age, education, work experience, anatomical impairment rating of [ten percent] to the body as a whole, her current back and leg problems, her lack of motivation to return to work and considering that she has been released at maximum medical improvement with no restriction identified," the ALJ found that appellant suffered twenty-percent wage-loss disability. The Commission adopted the ALJ's opinion.

As noted above, appellant argues that she is permanently and totally disabled, or alternatively, that she suffered a wage-loss disability greater than twenty percent. Appellees contend she is not entitled to any wage-loss disability. Our concern here is with the Commission's conclusion that appellant was not motivated to enter the workforce, while also finding appellant's complaints of pain were credible. If, as the Commission found, appellant was "credible in her description of her pain and other problems she identified and the effects of the pain medicine," then the Commission could not limit her wage-loss disability to only twenty percent by finding that her "lack of motivation in pursuing any suitable work substantially impedes her future earning capacity." Given appellant's testimony, which was credited by the Commission, appellant would be unable to pursue employment, and therefore, she could not be found to lack motivation. *See Whitlatch, supra* (reversing the Commission's denial of permanent and total disability where the Commission stated in part that the claimant had not attempted to seek employment but evidence showed that the claimant suffered from severe pain and the side effects of the pain medication). Furthermore, we observe that the vocational specialist indicated on cross-examination that if she considered, along with the "objective factors," that appellant's "subjective" pain was "true and correct," then it would be practically impossible for appellant to return to gainful employment. Thus, substantial evidence does not support the Commission's findings limiting appellant to only a twenty-percent wage-loss disability. Accordingly, we reverse and remand for reconsideration of appellant's wage-loss disability.

Reversed and remanded on direct and cross-appeals.

BIRD and GRIFFEN, JJ., agree.